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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~692~~ 70-29

JOHN GIGLIO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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April 15, 1971

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IN THE

Supreme Court of the United States

October Term, 1970

No. 892

JOHN GIGLIO,

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UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The Judgment of the District Court was affirmed by the Court of Appeals for the Second Circuit in open Court with no opinion. The judgment of the Court of Appeals appears in the Appendix at page A 156. The Order and Opinion of the District Court appears in the Appendix at page A 149.

Jurisdiction

The Judgment of the Court of Appeals was entered on September 23rd, 1970. (A 156) The Petition was filed October 23rd, 1970, and was granted March 1st, 1971. The

jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Statutory Provisions

Rule 33 of the Federal Rules of Criminal Procedure.

RULE 33. NEW TRIAL.

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. As amended Feb. 28, 1966, eff. July 1, 1966.

Constitutional Provision Involved

Constitution of the United States, Amendment V

No person shall . . . be deprived of life, liberty or property, without due process of law . . .

Questions Presented

1. Is newly discovered evidence of a prosecutor's promise of immunity to the Government's main witness, where the fact of that promise had been suppressed, sufficient basis

for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure?

2. Is a promise of immunity made by an Assistant United States Attorney attributable to the entire prosecutorial agency?

Statement of the Case

The Petitioner, John Giglio, was convicted in the United States District Court for the Eastern District of New York of two counts of violating Title 18, United States Code, Sections 2314 and 2, and one count of conspiracy in violation of Title 18, United States Code, Section 371. The indictment on which the judgment was entered was filed on October 6th, 1966 (A 5).*

The Government, in support of the Indictment, alleged that one Robert Taliento, while employed by the Manufacturers Hanover Trust Co. (A 15), on three separate occasions, cashed forged Travelers Express money orders. These checks bore the endorsement "George Cohen" (A 27), the name of a bank customer whose signature card Taliento had removed from the bank's files (A 20). Taliento, who became the Government's principal witness, alleged that he had received the checks from the Petitioner John Giglio and had turned the proceeds over to him. In return for his efforts, Taliento allegedly shared in the profits of this illegal scheme.

The above judgment of conviction was appealed by the Petitioner in the United States Court of Appeals for the

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* References to the Petitioners Appendix are introduced by the letter "A".

Second Circuit, wherein that conviction was affirmed. With respect to that decision of the Circuit Court, no Petition for a Writ of Certiorari was filed.

Subsequent to the decision of the Circuit Court, Petitioner filed a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure based upon newly discovered evidence. The District Court denied Petitioner's Motion (A 149) and this Order was affirmed by the Circuit Court without opinion (A 156). The facts which served as the basis of the Petitioner's Rule 33 Motion related to certain promises made to the Government's main witness, the existence of which were discovered subsequent to the time when the Petitioner had filed his original Brief in the Circuit Court.

Robert Taliento, the only Government witness to inculpate the Petitioner, testified that he had received no promise of immunity from prosecution in return for the testimony which he gave. Under cross-examination, Taliento testified as follows:

> "Q. Did anybody tell you at any time that if you implicated somebody else in this case that you yourself would not be prosecuted? A. Nobody told me I wouldn't be prosecuted.
>
> Q. They told you you might not be prosecuted? A. I believe I still could be prosecuted.
>
> Q. You were told, were you not, that you could be prosecuted in this case, is that correct? A. Yes.
>
> Q. Were you told that you would not be prosecuted if you testified against somebody else? A. Not that I wouldn't be prosecuted.
>
> Q. What were you told?
>
> Mr. Golden: Objection your Honor.

The Court: The objection will be overruled.
The Witness: Can you repeat the question?

(The last question was read by the reporter.)

A. That there is still a chance I could be prosecuted." (A 43-44)

Further cross-examination produced only more certain testimony by which Taliento under oath stated that no promise of immunity had been exchanged for his cooperation with the Government. With respect to his appearance before the Grand Jury, Taliento stated that he was solely motivated by the fact that he had been subpoenaed (A 45). Again and again, Taliento clearly and unequivocally stated that his understanding of the matter was that even as he spoke from the witness stand, he could still be prosecuted (A 49-51). When asked specifically if he was told that he would not be indicted if be testified, Taliento stated that "I was told I still could be indicted" (A 51).

The net effect of this testimony left an absolute impression on the jury that the accomplice-witness' cooperation with the Government was not motivated by assurances that he would come through the ordeal unscathed. This testimony, later revealed to be false, is further highlighted by the Assistant United States Attorney's reference to it in his closing argument to the jury. In summation, the Government Attorney stated that

"He (Taliento) received no promises that he would not be indicted". (A 119)

The newly discovered evidence which the Petitioner relied upon in bringing his Motion for a new trial in the Dis-

trict Court, was disclosure of the fact that there was an express promise made to Taliento that he would not be prosecuted if he agreed to become a witness against Giglio. As previously stated, discovery of this fact was made subsequent to the time when the Petitioner had originally filed his Brief on Appeal. Petitioner's counsel was advised by Assistant United States Attorney Anthony Di Paola, who was originally assigned to prosecute the matter, that on September 20, 1966, he had expressly promised Taliento that if Taliento testified before the Grand Jury against the Petitioner, he would not be indicted. This information was affirmed by Mr. Di Paola in an affidavit which he submitted to the District Court. (A 136) Mr. Di Paola's affidavit reads in part as follows:

> "It was further agreed and understood that he, Robert Edward Taliento, would sign a waiver of immunity from prosecution before the Grand Jury, and that if he eventually testified as a witness for the Government, at the trial of the defendant, John Giglio, he would not be prosecuted." (A 137)

Assistant United States Attorney Di Paola, although originally in charge of the Giglio file, was not the Assistant United States Attorney who eventually tried the case. Nonetheless it remains that the promise of immunity did, in fact, exist; a phenomenon which the witness successfully concealed.

Summary of the Argument

Petitioner's Brief presents a significant question concerning the application of the doctrines of *Napue* v. *State of Illinois*, 360 U.S. 264 (1959) and *Brady* v. *State of Mary-*

land, 373 U.S. 83 (1963) to Federal Motions for a new trial based upon newly discovered evidence. Indeed, the instant Petition presents two important questions for this Court's consideration. Petitioner first urges that discovery of a prosecutor's promise of immunity to the Government's principal witness after that witness had perjuriously denied that such promise had been made, is sufficient basis for a new trial where the prosecutor had constructive knowledge of the promise and withheld this information from the defense.

Secondly, Petitioner argues that a promise of immunity made by an Assistant United States Attorney who participated in the case be imputed to the entire prosecutorial agency. Moreover, Petitioner respectfully submits that all members of the prosecutorial team should be deemed to have constructive knowledge of any evidence exculpatory of or otherwise favorable to the accused where one Assistant prosecutor has actual knowledge of this material.

POINT I

Petitioner was denied due process of law; discovery of the Government's failure to disclose the promise of immunity made to its principal witness was sufficient grounds for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

As developed in our statement of the case, the jury, in order to have found the Petitioner guilty of the crimes charged, must have believed the testimony of Robert Taliento. Taliento, an accomplice by his own admission, was the only Government witness to implicate the Petitioner. The fact that Taliento may have furthered his own interests by

testifying was a matter for the jury to consider in assessing the witness's credibility. 2 *Wharton's Criminal Evidence,* p 445. Where the question of credibility was so important an issue, the jury, through the testimony of the witness and the summation of the prosecutor, was led to believe that Taliento received no assurances that he would not be prosecuted in return for his testimony.

As early as 1935, this Court held in *Mooney* v. *Holohan,* 294 U.S. 103 (1935), that a prosecuting attorney was under a Constitutional duty to disclose evidence which was beneficial to the defendant's case. There it was held that a conviction obtained through the use of knowingly false and perjured testimony cannot be permitted to stand. Subsequent decisions reaffirmed the position that the use of perjured testimony known to be such by the prosecuting attorney is a denial of due process. *Pyle* v. *State of Kansas,* 317 U.S. 213 (1942), and *White* v. *Ragen,* 324 U.S. 760 (1945).

In *Napue* v. *State of Illinois,* 360 U.S. 264 (1959) this Court extended the above stated rule when presented with a factual pattern unmistakeably similar to the case at bar. In *Napue* (*supra*), as in the instant case, the prosecution's principal witness testified that he had received no promise of consideration in return for his testimony. The Assistant State's Attorney had, in fact, promised him consideration but made no attempt to correct this false testimony. (In the case at bar, not only did the prosecutor not correct the false testimony but further adopted it in his closing argument to the jury.) The *Napue* Court stated that:

> "The same result [the denial of due process first mentioned in Mooney, supra] obtains when the State,

> although not soliciting false evidence, allows it to go uncorrected when it appears." (p. 269)

The *Napue* case (*supra*) further stands for the proposition that a defendant's Constitutional right to due process is also violated when such false testimony relates to the credibility of the witness rather than the substance of that testimony. The Court states at page 269:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."

The decision of this Court in *Brady* v. *State of Maryland*, 373 U.S. 83 (1963), a case which has become the leading authority on the prosecutor's duty to disclose exculpatory or otherwise favorable evidence to the accused, reflects a significant extension of the rule set down in *Mooney* v. *Holohan* (*supra*). While *Mooney* spoke to the issue of a knowing suppression of exculpatory material, *Brady* stands for the proposition that good faith or bad faith of the prosecutor is not relevant. At page 87, 373 U.S., the Court stated:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The effect of the principles set forth in *Brady* on a motion for a new trial based upon newly discovered evidence has been discussed in a long line of cases. Our lower Courts have held that when presented with a prosecutor's suppression of evidence the requirement of materiality must be met as with any other motion for a new trial based on newly discovered evidence. The critical question is what degree of materiality is necessary in order to overcome the defendant's burden in prosecuting a Rule 33 Motion.

To consider the effect of a prosecutor's breach of his Constitutional duty to disclose exculpatory material on a Motion for a new trial based upon newly discovered evidence one need first examine the test of materiality established for the traditional newly discovered evidence cases which do not involve prosecutorial suppression. As set forth in *United States* v. *Polisi*, 416 F. 2d 573 (2nd Cir., 1969), citing *United States* v. *Costello*, 255 F. 2d 876 (2nd Cir., 1958) cert. den'd 357 U.S. 937 (1958), the essentials for a new trial, which the defendant has the burden to show, *United States* v. *Lombardozzi*, 236 F. Supp. 957 (E.D.N.Y., 1964); aff'd 343 F. 2d 127 (2nd Cir., 1965), cert. den'd 381 U.S. 938 (1965) are that:

(1) the evidence must have been discovered since the trial;

(2) it must be material to the factual issues at trial, and not merely cumulative nor impeaching the character or credit of a witness; and

(3) it must be of such a nature that it would probably produce a different verdict in the event of a retrial.

These well established criteria regarding materiality, however, change when a case involves prosecutorial suppression. 8 A *Moore's Federal Practice* 33-27, 28.

Even prior to this Court's decision in *Brady* v. *State of Maryland* (*supra*) Judge Friendly, in *Kyle* v. *United States*, 297 F. 2d 507 (2nd Cir., 1961) recognized that the degrees of materiality vary in accordance with the type of breach committed. The Court stated that if the Government's suppression of evidence was mere negligence, one test of prejudice should be applied. Further:

> "If the hearing should lead to a finding of such negligence plus deliberate misstatements to the court and the petitioner, petitioner's burden would be less than in the case of negligence alone but more than in a case of deliberate suppression." (p. 515)

Seven years later, in *United States* v. *Keogh*, 391 F. 2d 138 (2nd Cir., 1968), Judge Friendly noted that the *Brady* decision, although eliminating the issue of a prosecutor's good faith, retained the requirement of materiality. (p. 147) The readily apparent question, however, is what degree of materiality need a defendant show in a given situation. In *Keogh*, (*supra*), the Court again recognized that the degree of materiality must be directly related to the severity of the breach of some duty which was required of the prosecutor. Another pre-*Brady* decision, *United States* v. *Consolidated Laundries Corporation*, 291 F. 2d 563 (2nd Cir., 1961), indicated that a Motion for a new trial may properly be granted where the Government has negligently suppressed material evidence. Although, as stated above, *Brady* erased the requirement that the suppression must be either deliberate or negligent, these delineations still bear heavily on the question of materiality.

In the instant Brief, it is the Petitioner's contention that the Government's failure to disclose the Assistant United States Attorney's promise of immunity to its main witness after the witness had perjuriously denied that it had been made, was a breach of duty which reached Constitutional proportions. It is further submitted that this suppression must fall within the category of either gross negligence or deliberate withholding of evidence. Two cases decided by the Second Circuit Court of Appeals, which speak to this issue, appeared to present a clear application of standards with respect to a new trial where prosecutorial misconduct was involved.

In *United States* v. *Miller*, 411 F. 2d 825 (2nd Cir., 1969), the Court reversed a District Court order denying a new trial where the Government had failed to produce a memorandum which could have been considered 3500 material. The previously established standards as to the materiality of the newly discovered evidence, i.e., the evidence must be material to the factual issues at the trial and not merely cumulative nor impeaching the character or credit of a witness and that the evidence must be of such a nature that it would probably produce a different verdict in the event of a new trial are, as the Court stated, reduced where the prosecution negligently fails to make evidence available to the defense. The Court then went on to state that where the Government's duty of disclosure had not been discharged

> "... a motion for a new trial must be granted if there is a significant possibility that the undisclosed evidence might have led to an acquittal or a hung jury ...".

It is interesting to note that the Court felt that such possibility existed even where the "defense already possessed an abundance of impeaching material" as to the credibility of the Government's principal witness. In *Miller* (*supra*), Judge Friendly again stated that the

> "... negligence of the prosecutor in failing to make evidence available to the defense reduces the standard of materiality needed to require the granting of a new trial below the formulations applicable where no prosecutorial misconduct exists."[1]

In *United States* v. *Polisi*, 416 F. 2d 573 (2nd Cir., 1969), which involved the Government's failure to reveal a conflicting statement made by the defendant's accomplice, the Court stated that the general rules with respect to the granting of a new trial, i.e. the generally held essentials set forth in *Costello*, (*supra*), do not apply

> "... where the prosecutor has suppressed evidence exculpatory of or otherwise favorable to the accused." (p. 577)

The Court further states that this rule is applicable even where the issue involves only the credibility of a witness and not the facts at issue citing *Napue* v. *State of Illinois*, (*supra*). The *Polisi* Court goes on to say that

> "A new trial is required where the prosecutor's failure to disclose was a considered decision for the sake of obstruction, or where the value of the evi-

[1] Judge Friendly's recognition of a reduced standard of materiality was not without precedent. In *Harrison* v. *U. S.*, 24 F. 2d 82 (7th Cir., 1928) the Court, when faced with newly discovered evidence of perjured testimony, held that a new trial should be granted where the jury *might* have reached a different conclusion.

> dence to the accused could not have escaped him." (p. 577)

The Court, by applying the principles set forth in *Brady*, (*supra*), reached the conclusion that in view of the prosecutorial suppression, the Appellant would be entitled to a new trial "even though Cordero's testimony 'probably' would not have produced a different verdict . . . and even though the testimony's primary effect would only be to impeach the credibility of the accomplices." Furthermore, the Court stated that "the same conclusion would result even assuming that, at the time of the trial, the Government could well have legitimately concluded that Cordero's testimoney was merely cumulative". (p. 578) The importance of *Brady*, the Court stated, is that such violations are measured

> ". . . by the effect of the suppression upon defendant's preparation for trial rather than its effect upon the jury's verdict".

The impact of *Miller* and *Polisi* was again recognized by the Second Circuit in *United States* v. *Silverman*, 430 F. 2d 106 (2nd Cir., 1970) and in *United States* v. *Bonanno*, 430 F. 2d 1060 (2nd Cir., 1970). These two cases treat as well established, the rule that the standards of materiality are substantially reduced where either perjured testimony or prosecutorial misconduct is involved. Nevertheless, in the case at bar, where there is evidence of both perjury and prosecutorial misconduct wholly substantiated by a sworn affidavit of an Assistant United States Attorney, the Circuit Court without opinion determined that the Trial Court did not abuse its discretion in denying Petitioners Motion. As Judge Friendly recognized in *Miller*, "[the withheld mate-

rial] could have been the 'capstone' of the defense attack on the crucial Government witness". At best the instant case is one where the prosecutor has failed to come completely clean. The breach of that duty, it is respectfully submitted, requires that a new trial be ordered.

POINT II

The Assistant United States Attorney who actually tried the case must be charged with the knowledge that a promise of immunity had been made to the principal witness.

In the case at bar, the promise made to the Government's principal witness that he would not be indicted in consideration for his testimony, was made by Assistant United States Attorney Anthony Di Paola within the scope of his apparent authority and as part of the "prosecution team". The issue presented to this Court is whether this promise and the knowledge that it did, in fact, exist, is to be imputed to the entire prosecutorial agency. Although this Court has never directly spoken to the issue, various decisions of our lower Courts have made it clear that a prosecutor cannot be held unaccountable for facts which are within the actual knowledge of another member of the prosecutorial staff.

In an often quoted decision *Application of Kapatos*, 208 F. Supp. 883 (S.D.N.Y., 1962), Judge Palmieri stated:

> ". . . I do not think that an accused's right as defined by Napue should depend on the fortuitious circumstance that the district attorney who conducts the investigation also conducts the prosecution, . . ."

In the instant case, there is no issue as to whether Taliento was a central witness; he was, in fact, the only witness to implicate the Petitioner, Giglio. Nor is there a question under *Napue*, (*supra*), of whether his false testimony was significant. In *Hawkins* v. *United States*, 324 F. 2d 873 (5th Cir., 1963), the Court was faced with a similar problem. An Assistant United States Attorney who allegedly made promises of leniency to Government witnesses in consideration for their testimony, was not the Assistant who later tried the case at the trial in issue. The Circuit Court found that

> "At the time these witnesses so testified, the government must be charged with knowledge that their testimony was false."

There are several other decisions, both on the Circuit and District Court levels which support the position taken by the Court in *Kapatos* and *Hawkins* (*supra*). See *Barbee* v. *Maryland*, 331 F. 2d 842 (4th Cir., 1964); *Nash* v. *Purdy*, 283 F. Supp. 837 (S.D. Fla., 1968); *Walker* v. *Bishop*, 295 F. Supp. 767 (E.D. Ark., 1967).

The American Bar Association, in its Project on Minimum Standards for Criminal Justice; Standards Relating to Discovery and Procedure Before Trial, recommended with regard to disclosure to the accused that:

> "The prosecuting attorney's obligations under this section extend to material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office." 2.1(d)

The obvious necessity of such a mandate is clear. *Brady* v. *State of Maryland* and the related decisions of this Court which have sought to safeguard a defendant's constitutional rights, lose all meaning if the prosecutor representing the Government at trial can rely upon the fact that he did not have actual knowledge of the *Brady* material.

In conclusion it need only be said that the affirmance of the order denying Petitioner's Motion for a new trial, in view of the above cited authority, attacks the conscience of American Criminal justice. No question exists as to whether the promise of immunity was made, nor can there be any dispute as to whether the witness perjured himself regarding this promise. To hold that the United States Attorney and the Trial Assistant are not responsible for these facts, offends logic. The totality of the above circumstances so clearly violate fundamental fairness in a criminal prosecution, as defined by *Napue* and *Brady*, that to sustain such prosecutorial conduct would distort the very meaning of due process.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court of Appeals for the Second Circuit should be reversed and the matter remanded to the District Court for a new trial.

Respectfully submitted,

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